IN THE

Supreme Court of the United States

October Term, 1978
No. 78-1548

CALIFORNIA BREWERS ASSOCIATION, *et al.*,

Petitioners,

vs.

ABRAM BRYANT,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

RESPONDENT'S BRIEF IN OPPOSITION.

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The respondent Abram Bryant respectfully requests that this Court deny the Petition for writ of certiorari, seeking review of the Ninth Circuit's opinion in this case. That opinion is officially reported at 585 F.2d 421, and is unofficially reported at 18 F.E.P.Cas. 826.

REASONS WHY THE WRIT SHOULD BE DENIED.

I

Petitioners Would Have a "Seniority System" Include Elements Which Have Nothing to Do With Seniority.

Stripped of sound and fury, the Petition makes a single argument: There is in the California Brewing Industry an overall structure for determining referrals, promotions, layoffs and other benefits. This structure has five tiers or classes of employees: (1) New Employees; (2) Apprentices; (3) Temporary Bottlers; (4) Temporary Employees (other than Bottlers); and (5) Permanent Employees. Each tier or class affords those within it some measure of job protection based upon, among other things, length of service. There are also provisions in some instances allowing workers in higher tiers preference over those beneath them both in referrals from the Union Hall to new jobs and in "bumping" during layoffs. The system also contains rules by which a worker may advance from one tier to another. This entire structure is, according to the Petitioners, a single, unified system *every part of which* is entitled to the full protection afforded *bona fide* seniority systems by Section 703(h) of Title VII, as interpreted in *Teamsters v. United States* (1977), 431 U.S. 324.

The trouble with such a claim is that it overshoots the mark. The measure of security within each tier and the right of one tier to preference over the lower tiers are, to be sure, parts of seniority. But the rules which determine entry into the system and advancement from one tier to the next have, for the most part,

nothing to do with seniority. Just because a worker advances to a new classification with additional seniority rights by passing a test does not mean that the test is part of the seniority system. Just because a worker begins to acquire seniority after completing his probationary period does not mean that probation is part of seniority. Just because a worker, once hired, begins to build seniority does not make the hiring process a part of the seniority system. *In short, Petitioners have confounded the notion of seniority with that of the qualifications required to enter a particular seniority line.*

In *Patterson v. American Tobacco Co.* (4th Cir. 1978), 586 F.2d 300, 303, the Fourth Circuit considered this very question and held:

> "Section 703(h) does not insulate an entire promotional system even if such system is facially neutral. At most, it insulates only the seniority aspects of the promotional system. Consequently, *Teamsters* requires no modification of the relief we approved with regard to job descriptions, lines of progression, back pay (except such awards as may have been founded upon American's seniority system) or supervisory appointments."

It is possible, of course, to determine qualifications for promotion wholly or in part by resort to the seniority which a worker has built up in his current classification or during his overall employment. Such a system simply harkens back to the seniority measures already established to determine job security and, as such, is entitled to the same *bona fides* attributable to that system.

But that is not the case here. The requirement that, for promotion, an employee work 45 weeks in a single

calendar year does not harken back to anything. It is without counterpart in plant or classification seniority. It is a unique and autonomous criterion for promotion which—like a test or a supervisor's recommendation—is concerned solely with advancement from one classification to the next.

The Court of Appeals was very clear on this point:

> "The 45-week rule is simply a classification device to determine who enters the permanent employee seniority line and this function does not make the rule part of a seniority system. Otherwise any hiring policy (*e.g.* an academic degree requirement) or classification device (*e.g.* merit promotion) would become part of a seniority system merely because it affects who enters the seniority line." 585 F.2d at 427 (fn. 11) (App. A. to Petition, p. 12).

Furthermore, as the Court of Appeals was at pains to point out:

> "The fundamental component of a seniority system is the concept that employment rights should increase as the length of an employee's service increases. 'Seniority is a system of employment preference based on length of service; employees with the longest service are given the greatest job security and the best opportunities for advancement.' Aaron, *Reflections on the Legal Nature and Enforceability of Seniority Rights,* 75 Harv. L.Rev. 1532, 1534 (1962).
>
> "In contrast, the brewery industry's 45-week requirement does not involve an increase in employment rights or benefits based upon the length of the employee's accumulated service. 585 F.2d at 426 (App. A to Petition, p. 9).

In this respect the situation is quite different from that in *Alexander v. Machinists, Areo Lodge No. 735* (6th Cir. 1977), 565 F.2d 1364, cited by Petitioners. There, in bidding for promotion, length of service in a particular job was allowed to override total length of service in the plant. In other words, "job seniority" took preference over "plant seniority". Notice, however, that the basic notion that employment rights should increase as length of service increases was retained. That the focus was on service in a particular job makes no difference since, as Petitioners correctly point out, "seniority systems assume an almost infinite variety" (Petition, p. 13); and, so long as the fundamental requirement that employment rights increase with service is met, it matters not whether overall, departmental, or job seniority is selected.

The vice of the 45-week provision is that employment benefits do not increase with service:

> "Under this requirement, employees junior in service to the employer may acquire greater benefits than senior employees. Although an employee must work at least 45 weeks before becoming a permanent employee, the acquisition of permanent status may be independent both of the total time worked and the overall length of employment. Some employees could acquire permanent status after only 45 weeks of work, if the 45 weeks were served in one calendar year. Other employees could work for many years and never attain permanent status because they were always terminated a few days before completing 45 weeks of work in any one year." 585 F.2d at 426-7 (App. A to Petition, pp. 9-10).

There is a striking similarity between the workings of the 45-week requirement and a provision struck down by the recent decision of the Fifth Circuit in *Parson v. Kaiser Aluminum & Chemical Corp.* (5th Cir. 1978), 583 F.2d 132. There, in order to advance, the worker had to bid into a new department but, if successful, was required to stay in the lowest position in that department for 10 days or until a vacancy in a higher job became available. The Court found that the vice of such a provision—like the vice of the 45-week rule—rests in the danger that a vacancy may not arise for months, or even years.

Plaintiff's own situation illustrates this all too clearly. For seven years he worked, with only intermittent breaks in service, in the brewery industry. Over those years his job was his primary source of income. Yet, during the seven years, he was never allowed to build up the required 45 weeks of service in one calendar year; and he therefore remains, despite his years of application, a "Temporary Employee."

The *Parson* Court also addressed itself to Petitioner's argument that provisions like the 10-day or 45-week rules are protected by Section 703(h):

> "While the rules for bidding for vacancies *within* a department are governed by seniority and thus by *Teamsters,* the ten-day bottom entry requirement is not a seniority rule at all. Rather, it is a condition upon *transfer* wholly extraneous to the prevailing seniority system, and, as such, is *not* immunized by §703(h) and *Teamsters.*" 583 F.2d at 133 (emphasis by the Court).

II

The Court of Appeals Had Before It All of the Facts Required for a Decision.

The Ninth Circuit found that the 45-week provision lacked the essential requirement of seniority; namely, that it provide benefits which, in one way or another, increase as length of service increases. In making this finding, the Court had before it the clear and unambiguous terms of the provision.

Surely Petitioners do not pretend that there are facts, unknown to the Court, which could somehow transubstantiate the 45-week provision into one in which benefits do increase with service. And, unless that be the claim, the Court of Appeals had before it all the facts required for decision.

III

No Significant Issue Has Been Presented to This Court and the Issue Submitted Is Not Dispositive of the Case.

The basic labor service for those activiely engaged in collective bargaining is BNA, COLLECTIVE BARGAINING NEGOTIATIONS AND CONTRACTS (2 vols.) It sets forth a large number of specimen contracts and contractual provisions, together with statistics indicating the prevalence of such provisions from industry to industry. One searches this service in vain for anything like the 45-week provision.

The fact of the matter is that the provision is idiosyncratic to the California Brewery Industry and so presents no significant issue requiring decision by this Court.

Petitioners also neglect to mention a facet of the Court of Appeals decision which, regardless of the outcome of their petition, would eventually require trial in the District Court.

The complaint alleges discrimination in the application, as distinguished from the existence, of the 45-week provision such that white workers who had not complied with its strictures were nevertheless advanced to permanent status while Black employees remained Temporaries. 585 F.2d at 424, 428 (App. A to Petition, pp. 4-5, 12-13). This is an issue which must be tried regardless of what happens in this proceeding.

Conclusion.

The Court of Appeals correctly determined that the 45-week provision was merely a device, like a test or an academic degree, which was used to decide who could enter a particular seniority line and that it bore no relationship to the legitimate end of seniority —to bestow benefits based on length of service. Nothing in the Petition for a writ of certiorari contravenes those findings. The writ should therefore be denied.

Respectfully submitted,

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Attorney for Respondent.